Supreme Court, U.S.
FILED

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OFFICE OF THE CLERK

No. _____

In The
Supreme Court of the United States

CHARLES C. JON-NWAKALO,

Petitioner,

v.

DORMITORY AUTHORITY OF THE STATE NEW YORK and JOHN BUONO, Individually and as Executive Director of the Dormitory Authority of the State of New York,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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23 pp

QUESTION PRESENTED

Whether Dr. Charles C. Jon-Nwakalo's claims of employment discrimination on the basis of race and national origin should have proceeded to trial by a jury because the record in this action shows that a jury may infer the ultimate fact of discrimination from the falsity of the respondents' explanations for the many adverse employment practices to which Dr. Jon-Nwakalo was subjected?

PARTIES TO THE PROCEEDING

Petitioner

Charles C. Jon-Nwakalo

Respondents

Dormitory Authority of the State of New York and John Buono, Individually and as Executive Director of the Dormitory Authority of the State of New York.

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OPINIONS BELOW

The opinion of the United States Court of Appeals for the Second Circuit is an unpublished opinion. A copy of the opinion is included in the Appendix at Appendix A at 1a-4a. A copy of the Court of Appeals order that denied rehearing is included in the Appendix at Appendix B at 5a-6a. The memorandum, decision, and order of the district court, which is also unpublished is included in the Appendix at Appendix C at 7a-22a.

JURISDICTION

The United States Court of Appeals for the Second Circuit filed its Opinion on November 1, 2000. The Court of Appeals filed its order that denied a timely Petition for Rehearing and Suggestion for Rehearing *En Banc* on December 12, 2000 (App. B). This Petition for Writ of Certiorari is filed within 90 days of the denial of the Petition for Rehearing. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

The Civil Rights Act of 1866, 42 U.S.C. § 1981

All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, be

parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and shall be subject to like punishment, pains, penalties, taxes licenses, and exactions of every kind, and to no other.

The Civil Rights Acts of 1871, 42 U.S.C. § 1983

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress, except that in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to a statute of the District of Columbia.

The Civil Rights Act of 1964, 42 U.S.C. § 2000e-2

It shall be an unlawful employment practice for an employer-

(1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such

practice for an employer-

(1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin; or

(2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin.

STATEMENT OF THE CASE

Charles C. Jon-Nwakalo (hereinafter Jon-Nwakalo) is a United States citizen of African descent. he was born in the country of Nigeria. In 1980, Jon-Nwakalo obtained the degree of Bachelor of Science in Architecture from the University of Nebraska, located in Lincoln, Nebraska; in 1984, he obtained the degree of Master of Science in City and Regional Planning from Pratt Institute, located in Brooklyn, New York; in 1985 he obtained the degree of Bachelor of Architecture from Catholic University located in Washington, D.C.; and in 1988 he obtained the degree of Doctor of Philosophy in Urban and Environmental Planning from Rensselaer Polytechnic Institute located in Troy, New York.

In February 1990, Jon-Nwakalo became employed as a Developmental Administrator I at the Facilities Development Corporation (hereinafter FDC), a public benefit corporation owned by the State of New York that had statutory authority to design, construct, and/or rehabilitate hospitals, nursing homes, and residences for the developmentally disabled; treatment centers for those with substance addictions; and housing for the homeless in the State of New York. Jon-Nwakalo served as a Developmental Administrator I until September 1, 1995 when the corporation merged with the respondent Dormitory Authority of the State of New York (hereinafter DASNY).

Prior to the merger, Jon-Nwakalo was offered the temporary position of Field Representative III. Jon-Nwakalo was overqualified for the position which

required a Bachelor's degree in engineering or architecture plus a minimum of five years responsible experience in the construction inspection or supervision of major public works or private construction projects; plus knowledge of applicable codes; or a minimum of eight years of responsible experience as described above. In addition to his education, Jon-Nwakalo possessed fifteen years of professional experience.

Several employees of FDC who were of European descent who had lesser qualifications than Jon-Nwakalo were selected for positions at DASNY that were superior to the Field Representatives III. For example, John Van Zutphen (hereinafter Van Zutphen) was assigned to a Project Manager I position at DASNY, a permanent position. At FDC, Van Zutphen was a Project Coordinator who reported to Jon-Nwakalo. After the merger, Jon-Nwakalo reported to Van Zutphen. Van Zutphen did not possess the qualifications for the Project Manager I position which required a Bachelor's degree in Engineering or Architecture and professional experience in the management, design, or construction of public works or private construction projects. Despite this, the respondents argued that Van Zutphen's professional experience was superior to Jon-Nwakalo's.

By letter dated August 10, 1995, Jon-Nwakalo informed the respondent John Buono (hereinafter Buono), the then Executive Director of DASNY, that he accepted DASNY's offer of employment but that he believed that he should have been selected for a higher-ranking position than Field Representative III. Jon-Nwakalo hoped that if he continued to work hard, he would advance his position at DASNY. He was encouraged because DASNY appeared to recognize and encourage educational achievements. DASNY had an

Tuition Reimbursement Policy that was intended to give employees an opportunity to improve job related skills, acquire additional job related specialized knowledge, and increase the number of trained personnel available for promotion.

DASNY also had an Affirmative Action Program (hereinafter the Program) at all times relevant to this action. The purpose of the Program was to require equal employment opportunity in recruitment, selection, retention, transfer, promotion, and training for all qualified persons. The Affirmative Action Program required among other things:

> vacancies will be posted internally;
>
> emphasis will be placed on affording opportunities for protected-class applicants to apply for and to be considered for appointment to vacant positions;
>
> at least two weeks time will be allowed between advertising a vacancy and the hiring decision to afford protected-class applicants the opportunity to apply. This time allowance may be waived only by the Executive Director;
>
> Directors, managers, and supervisors will interview, and consider for appointment, all known protected-class applicants who meet the qualifications posted/advertised for a vacant position before making a hiring decision;
>
> when a protected-class applicant has applied for employment and before a final hiring decision is made, the Affirmative Action Officer and the

Executive Director will insure that affirmative action considerations have been taken in to account in the hiring decision;

The Program applied to all job classifications and positions at DASNY and responsibility for the achievement of equal opportunity at DASNY through its Affirmative Action Program rested with the Executive Director.

In September 1995, Jon-Nwakalo applied for a Project Manager at DASNY. James Gray (hereafter Gray), the Director of SUNY and Independent Institutions Program at DASNY, selected Carol Maynard for the position. Both Gray and Maynard are of European descent. Gray testified that he did not consider Jon-Nwakalo for the position because Jon-Nwakalo had been with DASNY only one month and because Jon-Nwakalo told Gray that he was not interested in this position because it was in Buffalo. However, the position description for the Project Manager positions did not set forth that an applicant had to be employed for any length of time by DASNY to be considered for the position and Jon-Nwakalo testified that he never informed Gray that he was not interested in a position in Buffalo. Shortly after he became employed at DASNY, he acknowledged in writing that he understood that may be transferred or reassigned to another geographical or organizational location of the State. Jon-Nwakalo testified that he would happily consider moving to another part of the State to improve his professional standing.

In or about October 1995, Jon-Nwakalo applied for the positions of Chief of Design Services and Chief of Field Operations. Jon-Nwakalo met all the qualifications

for these positions except that he did not yet have his Registered Architect's license. However, Jon-Nwakalo informed Marilyn Gehr, who was the Director of Human Resources at DASNY, that he had passed eight out of the nine parts of the Architect's Registration examination and that he was confident that he would pass the ninth part of the examination at his next sitting (which he did). Gehr instructed Jon-Nwakalo to submit a memo to this effect for consideration with his application, which he did. Jon-Nwakalo was not considered for either position.

In or about June 1996, Jon-Nwakalo applied for the position of Project Manager III. Jon-Nwakalo was interviewed for the position by Gray but his application was rejected. Gray selected John Andrus (hereinafter Andrus) for the position. Andrus is of European descent. Gray testified that Andrus' degree in Construction Management was more valuable to DASNY than Jon-Nwakalo's Ph.D.. However, the posted qualifications for the position were a Bachelor's degree in Engineering or Architecture.

In or about March 1998, Jon-Nwakalo applied for the position of a Project Manager III for the construction of an acute care hospital in Queens County, New York. The qualifications for this position were: A minimum of ten years satisfactory experience in the construction management of an acute care hospital; or A Bachelor's degree in Engineering or Architecture plus a minimum of seven years construction management of an acute care hospital; Engineering or Architecture license a plus but not required. Jon-Nwakalo was interviewed for the position by Dennis Falvey and Peter McGlinchy (hereafter Falvey and McGlinchy, respectively), who are both of European descent.

Falvey testified that Jon-Nwakalo was rejected for

the position because on his resume and at the interview, Jon-Nwakalo indicated that he was the Project Manager for a $658,000.00 New York Hospital project and a $135,000.00 Hospital for Special Surgery project, but that he was not able to provide the details of the projects that a full service manager should know. He could not provide the square footage for the New York Hospital project and he told Falvey and McGlinchy that it was a two-hundred bed project when they knew that it was a seven-hundred and sixty bed project. Falvey testified that they made follow-up telephone calls to the construction managers at the New York Hospital. Falvey claimed that the construction managers, who were not identified by Falvey, did not know Jon-Nwakalo.

Jon-Nwakalo controverted Falvey's version of what transpired at the interview. Jon-Nwakalo testified that he informed Falvey and McGlinchy of his education and experience as set forth above. He informed them that he managed the construction of the "fast track," first Acute Care AIDS clinic for St. Clare's Hospital in New York City and that he received a commendation from the President of the hospital for his work on that project. Jon-Nwakalo explained the processes involved in a fast track project delivery and he informed Falvey and McGlinchy that he received his architect's license and registration in December 1996.

Jon-Nwakalo answered each of Falvey's and McGlinchy's questions truthfully, including their questions regarding his role as Project Manager for the New York Hospital project and the Hospital for Special Surgery project. He brought with him sample copies of the inspection reports prepared by the consultant for the projects. He provided McGlinchy and Falvey with a general description of the scope of work on these

projects and he explained that these projects were basic service projects. There was no discussion of the building area or the number of beds for the projects.

In June 1998, Jon-Nwakalo applied for the position of Managing Director of Construction Services even though the position was not posted. Jon-Nwakalo was qualified for the position because of his education, license, and professional experience. Thomas Murphy (hereafter Murphy), who was Chairman of DASNY, told Jon-Nwakalo that he would be considered for the position; however, Jon-Nwakalo was not considered for the position. The respondents never complied with their Affirmative Action Program when Jon-Nwakalo applied for the various positions described above.

Jon-Nwakalo invoked the jurisdiction of the district court under 28 U.S.C. § 1331 (general federal question jurisdiction); § 1343(3) (jurisdiction to redress deprivation of rights guaranteed by any Act of Congress); and § 1343(4) (to recover damages or secure equitable relief under any Act of Congress providing for the protection of civil rights). The district court granted the respondents' motion for summary judgment. App. C at 7a-21a. The court of appeals affirmed the judgment of the district court and later denied a petition for rehearing. App. A at 1a-2a, App. B at 3a.

REASONS FOR GRANTING THE WRIT

THE DECISION OF THE COURT OF APPEALS CONFLICTS WITH THE DECISIONS OF THE SUPREME COURT.

In Reeves v. Sanderson Plumbing Products, Inc., ___ U.S. ___, 120 S. Ct. 2097 (2000), this Court held

that the standards for granting summary judgment pursuant to Federal Rule of Civil Procedure 56 mirror those for granting judgment as a matter of law pursuant to Federal Rule of Civil Procedure 50 as follows:

> Under Rule 50, a court should render judgment as a matter of law when "a party has been fully heard on an issue and there is no legally sufficient evidentiary basis for a reasonable jury to find for that party on that issue." Reeves at 2109, quoting Federal Rule of Civil Procedure 50(a).
> The court must review the record "taken as a whole." Id. at 2110 quoting Matsushita Elec. Industrial Co. v. Zenith Radio Corp., 475 U.S. 574, 587, 106 S. Ct. 1348.
>
> In so doing however, the court must draw all reasonable inferences in favor of the nonmoving party, and it may not make credibility determinations or weigh the evidence. Reeves at 2110.
>
> "Credibility determinations, the weighing of evidence, and drawing all legitimate inferences from the facts are jury functions, not those of the judge." Id. quoting Anderson v. Liberty Lobby, Inc., 477 U.S. at 255, 106 S. Ct. 2505 (1986).
>
> Thus, although the court should review the record as a whole, it must disregard all evidence favorable to the moving party

> that the jury is not required to believe. That is, the court should give credence to the evidence favoring the nonmovant as well as that "evidence supporting the moving party that is uncontradicted and unimpeached, at least to the extent that the evidence comes from a disinterested witness."

Reeves, supra at 2110 quoting Anderson v. Liberty Lobby, Inc., 477 U.S. at 300, 106 S. Ct. 2505 (1986).

This Court further held "it is permissible for the trier of fact to infer the ultimate fact of discrimination from the falsity of the employer's explanation." Reeves, supra (emphasis in original). Once the employer's justification has been eliminated, discrimination may well be the most likely alternative explanation, especially since the employer is in the best position to put forth the actual reason for its decision." Reeves citing Furnco Constr. Corp. v. Waters, 438 U.S. 567, 577 (1978).

It is respectfully submitted that the lower courts did not review the record "taken as a whole;" did not draw any reasonable inferences in favor of Jon-Nwakalo, the nonmoving party; and did not follow this Court's holding that "it is permissible for the trier of fact to infer the ultimate fact of discrimination from the falsity of the employer's explanation."

The district court found that Jon-Nwakalo failed to present specific facts to show that there is a genuine issue for pretext, either by showing a discriminatory motivation by the defendants or by showing that the defendants' proffered legitimate explanations are not credible. App. C at 16a. However, the record of this

action refutes this finding and shows that a reasonable finder of fact may find that the defendants' proffered legitimate explanations are not credible. For example, a reasonable finder of fact may find that the defendants' explanation for Jon-Nwakalo's non-selection for a Project Manager position at the time of the merger of FDC and DASNY in September 1995 in favor of white employees on the basis that the white employees had greater professional experience than Jon-Nwakalo is not credible. Each of the white employees lacked the respondents' stated qualifications for the position. One of the white employees selected for the Project Manager position, John Van Zutphen, had been supervised by Jon-Nwakalo at FDC. The district court did not address this evidence.

Similarly, the lower courts did not address Jon-Nwakalo's claims regarding the rejection of his application for a Project Manager position in DASNY's Buffalo office in September 1995. Gray testified that he did not consider Jon-Nwakalo for the position because Jon-Nwakalo had been with DASNY only one month and because Jon-Nwakalo told Gray that he was not interested in this position because it was in Buffalo. However, the position description for the Project Manager position did not set forth that an applicant had to be employed for any length of time by DASNY to be considered for the position. In addition, Jon-Nwakalo testified that he never informed Gray that he was not interested in a position in Buffalo. Shortly after he became employed at DASNY, he acknowledged in writing that he understood that may be transferred or reassigned to another geographical or organizational location of the State. Jon-Nwakalo testified that he would happily consider moving to another part of the State to improve his professional standing.

The district court did not address Jon-Nwakalo's claims regarding the rejection of his applications for the position of a Project Manager III for the construction of an acute care hospital in Queens County, New York in March 1998. As set forth above, Jon-Nwakalo was interviewed for the position by Falvey and McGlinchy. Falvey testified that on Jon-Nwakalo's was rejected for the position because he inflated his qualifications and expierence. He offerd the hearsay testimony of individuals (who were never identified) to butress his testimony.

Jon-Nwakalo vehemently disputed Falvey's version of what transpired at the interview and set forth in detail his qualifications for the position. Jon-Nwakalo testified that he informed Falvey and McGlinchy of his education, experience, and license. He informed them that he managed the construction of the "fast track," first Acute Care AIDS clinic for St. Clare's Hospital in New York City and that he received a commendation from the President of the hospital for his work on that project. He answered each of Falvey's and McGlinchy's questions truthfully, including their questions regarding his role at the projects that he managed. He brought with him sample copies of the inspection reports prepared by the consultant for the projects and provided McGlinchy and Falvey with a general description of his scope of work on these projects.

Given these factual disputes, Jon-Nwakalo's claims should have proceeded to trial by a jury to determine the credibility of the defendants' explanations. Reeves v. Sanderson Plumbing Products, Inc.; Anderson v. Liberty Lobby, Inc., supra. A jury may reasonably find that the respondents' explanations for

rejecting Jon-Nwakalo's various applications for promotions are not worthy of belief, and that impermissible discrimination was the reason he was not selected for the positions. Such a finding may be buttressed by other substantial circumstantial evidence in the record including: Jon-Nwakalo's impressive qualifications for the positions that he sought; the respondents' disregard of their stated job qualifications when filling the vacant positions; the respondents' disregard of their policy of rewarding the educational achievements of their employees; and the respondents' flagrant and repeated disregard of their own Affirmative Action Program.

This Court has long held that a Title VII plaintiff must usually rely on the commutative weight of circumstantial evidence to prove the element of discriminatory motive. U.S. Postal Service Board of Governors v. Aikens, 460 U.S. 711 (1983). Thus, the lower courts requirement that Jon-Nwakalo tender more than circumstantial evidence to prove discrimination conflicts with the decisions of this Court.

CONCLUSION

For the reasons set forth above, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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Attorney for Petitioner

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

SUMMARY ORDER

THIS SUMMARY ORDER WILL NOT BE PUBLISHED IN THE FEDERAL REPORTER AND MAY NOT BE CITED AS PRECEDENTIAL AUTHORITY TO THIS OR ANY OTHER COURT, BUT MAY BE CALLED TO THE ATTENTION OF THIS OR ANY OTHER COURT IN A SUBSEQUENT STAGE OF THIS CASE, IN A RELATED CASE, OR IN ANY CASE FOR PURPOSES OF COLLATERAL ESTOPPEL OR RES JUDICATA.

At a stated Term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse, Foley Square, in the City of New York, on the 1st day of November two thousand.

United States Court of Appeals
Second Circuit
Filed November 1, 2000
Roseann B. MacKechnie, Clerk

Present: HON. WILFRED FEINBERG,
HON. ROGER J. MINER,
HON. ROBERT A. KATZMAN,
Circuit Judges.

CHARLES C. JON-NWAKALO,

Plaintiff-Appellant,

- v - 00-7368

NEW YORK STATE FACILITIES DEVELOPMENT CORPORATION, DORMITORY AUTHORITY OF THE STATE NEW YORK, and JOHN BUONO, Individually and as Executive Director of the Dormitory Authority of the State of New York,

Defendants-Appellees.

For Plaintiff-Appellant:
Valerie A. Hawkins,
Hempstead, New York

For Defendants-Appellees:
Alan J. Goldberg, Whiteman,
Osterman & Hanna,
Albany, New York

Appeal from the United States District Court for the Northern District of New York (Hurd, J.).

ON CONSIDERATION WHEREOF, IT IS HEREBY ORDERED, ADJUDGED, AND DECREED that the judgment of the District Court be and it hereby is **AFFIRMED.**

Plaintiff-appellant Charles C. Jon-Nwakalo appeals form the judgment of the United States District Court for the Northern District of New York (Hurd, J.), awarding summary judgment to the defendants on plaintiff-appellant's claims of race and national origin discrimination under Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-2 et seq., under 42 U.S.C. §§ 1981 and 1983, and under New York State law. Jon-Nwakalo also appeals the prior decision of the United States District Court for the Southern District of New York (Paterson, J.), transferring venue to the Northern District of New York.

A district court's decision to transfer venue is reviewed for abuse of discretion. See Friedman v. Revenue Management of New York, 38 F. 3d 668, 672 (2d Cir. 1994). We find that the district court acted within its discretion in transferring this case, pursuant to 28 U.S.C. § 1404(a), to a district in which venue was permissible under Title VII, see 42 U.S.C. § 2000e-5(f)(3) (West 1994), in which, inter alia, Jon-Nwakalo, defendant Buono, and most of the affiants and deponents reside, and in which the relevant records are maintained by the defendant Dormitory Authority of the State of New York.

We review a district court's award of summary judgment de novo. See Howley v. Town of Stratford, 217 F. 3d 141, 151 (2d 2000). Despite the able arguments made by plaintiff-appellant's lawyer, upon such review, we find that summary judgment was properly awarded to the defendants, substantially for the reasons stated by the district court.

The judgment of the district court is **AFFIRMED**.

FOR THE COURT:
ROSEANN B. MacKECHNIE, CLERK
By:

/s/

LUCILLE CARR

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

United States Courthouse
40 Foley Square
New York 10007

ROSEANN B. MacKECHNIE CLERK

At a stated Term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse, Foley Square, in the City of New York, on the 12th day of December two thousand.

United States Court of Appeals
Second Circuit
Filed December 12, 2000
Roseann B. MacKechnie, Clerk

CHARLES C. JON-NWAKALO,

Plaintiff-Appellant,

- v - 00-7368

NEW YORK STATE FACILITIES DEVELOPMENT CORPORATION, DORMITORY AUTHORITY OF THE STATE NEW YORK, and JOHN BUONO, Indivi-dually and as Executive Director of the Dormitory Authority of the State of New York,

Defendants-Appellees.

A petition for panel rehearing and a petition for rehearing en banc having been filed herein by the appellant Charles C. Jon-Nwakalo.

> Upon consideration by the panel that decided the appeal, it is Ordered that said petition for rehearing is **DENIED.**

It is further noted that the petition for rehearing en banc has been transmitted to the judges for the court in regular active service and to any other judge that heard the appeal and that no such judge has requested that a vote be taken thereon.

FOR THE COURT:
ROSEANN B. MacKECHNIE, CLERK

By:

/s/

Beth J. Meador,
Administrative Attorney

APPENDIX C

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF NEW YORK

CHARLES C. JON-NWAKALO,

Plaintiff,

- v - 98-CV-202

DORMITORY AUTHORITY OF THE STATE NEW YORK, and JOHN BUONO; Individually and as Executive Director of the Dormitory Authority of the State of New York; NEW YORK STATE FACILITIES DEVELOPMENT CORPORATION;

Defendants.

APPEARANCES: OF COUNSEL:

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DAVID N. HURD
United States District Judge

MEMORANDUM-DECISION and ORDER

I. INTRODUCTION

Plaintiff, Charles C. Jon-Nwakalo ("plaintiff" or "Jon-Nwakalo") brought this action alleging that defendants discriminated against him in his employment due to his race. Jon-Nwakalo asserts claims under 42 U.S.C. §§ 1981, 1983, 2000e, and N.Y. Exec. Law § 290. Defendants moved for summary judgment. Plaintiff opposes the motion. Oral argument was heard on December 17, 1999, in Utica, New York. Decision was reserved.

II. FACTS

Jon-Nwakalo is an African American, having moved to this country form his native Nigeria in 1976. he became a naturalized citizen of the United States in July 1988.

Jon-Nwakalo received a B.S. degree in Architecture from the University of Nebraska in 1980,

and M.S. degree in City Regional Planning from Pratt Institute in 1984, and a Bachelor of Architecture degree from Catholic University in 1985. Additionally, Jon-Nwakalo received a Ph.D. degree in Urban and Environmental Planning from Rensselaer Polytechnic Institute in 1988. He obtained his architects license in December 1996.

Jon-Nwakalo began his employment with the defendant New York State Facilities Development Corporation ("FDC") in February 1990. While at FDC Jon-Nwakalo held the position of Development Administrator I, managing the Commission for the Blind and Visually Handicapped ("CBVH") program. In March 1990 he applied for the position of Director of Design and Construction, but was not considered because he had been with FDC less than the required six months. He also applied for the positions of Director of Design and Construction (upstate) in October 1990, Director of Design and Construction (downstate) in October 1992, Director of Design and Construction (upstate) in July 1994. Jon-Nwakalo did not receive any of these positions.

In September 1995, FDC merged into the defendant Dormitory Authority of the State of New York ("DASNY"). Of the 285 employees of FDC at the time of the merger, 105 were not offered positions at DASNY.

Jon-Nwakalo had applied for a Project Manager position with DASNY at the time of the merger. However, Jon-Nwakalo was offered, and accepted, the position of Field Representative III with DASNY in August 1995, and has been employed there since that time. In September 1995 Jon-Nwakalo applied for a Project Manager position. In October 1995 he applied

for two positions, Chief of Design Services and Chief of Field Operations. In June 1996 Jon-Nwakalo applied for a Project Manager III position. He was not promoted to any of these positions.

In January 1998 Jon-Nwakalo was promoted to the position of Project Manager I. In March 1998 he applied for a promotion to a Project Manager III, which he did not receive. Also in 1998 he applied for three additional positions, Managing Director of Construction Services, Senior Project Management, and Director of Engineering Services, none of which he received.

III. DISCUSSION

A. Summary Judgment Standard

Summary judgment must be granted when the pleadings, depositions, answers to interrogatories, admissions and affidavits show that there is no genuine issue as to any material fact, and that the moving party is entitled to summary judgment as a matter of law. Fed. R. Civ. P. 56; Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 247 (1986); Richardson v. New York State Dep't. of Correctional Services, 180 F. 3d 426, 436 (2d Cir. 1999); Lang v. Retirement Living Pub. Co., 949 F. 2d 576, 580 (2d Cir. 1991). The moving party carries the burden of demonstrating an absence of a genuine issue of material fact. Fed. R. Civ. P. 56; Celotex Corp. v. Catrett, 477 U.S. 317, 323 (1986); Thompson v. Gjivoje, 896 F. 2d 716, 720 (2d Cir. 1990). Facts, inferences therefrom, and ambiguities must be viewed in the light most favorable to the nonmovant. Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 586 (1986); Richardson, 180 F. 3d at 436; Project Release v. Prevost, 722 F. 2d 960, 968 (2d Cir. 1983).

Where the moving party has met his burden, the nonmoving party must do more than simply show that there is some metaphysical doubt as to the material facts." Matsushita Elec. Indus. Co., 475 U.S. at 586. At that point the nonmoving party "must set forth the specific facts showing that there is a genuine issue of fact for trial." Fed. R. Civ. P. 56; Liberty Lobby, Inc., 477 U.S. at 250; Matsushita Elec. Indus. Co., 475 U.S. at 587. To withstand a summary judgment motion, sufficient evidence must exist upon which a reasonable jury could return a verdict for the nonmovant. Liberty Lobby, Inc., 477 U.S. at 248-49; Matsushita Elec. Indus. Co., 475 U.S. at 587.

Moreover, material facts set forth in the movant's statement required by the local rules are deemed admitted unless controverted by the nonnovant's statement in opposition. L.R. 7.1(a)(3). Thus, no genuine issue exists as to facts set forth in a movant's 7.1 Statement if the nonmovant fails to put such facts into controversy by a response in opposition to the summary judgment motion. See id.

B. Title VII Standard

In order to establish a prima facie case of discriminatory failure to promote, a plaintiff must prove that he was a member of a protected class, he applied for and was qualified for an open position for which the defendant sought applicants, and was qualified for an open position for which the defendant sought applicants, and he was rejected for the position under circumstances giving rise to an inference of discrimination. Brown v. Coach Stores, Inc., 163 F. 3d 706-10 (2d Cir. 1998); Grady v. Affiliated Central, Inc.,

130 F. 3d 553, 559 (2d Cir. 1997), cert. denied, 119 S. Ct. 349 (1998); Hollander v. American Cyanamid Co., 895 F. 2d 80, 83 (2d Cir. 1990). If a plaintiff establishes a prima facie case, he "creates a presumption that the employer unlawfully discriminated" against him. Texas Dep't of Community Affairs v. Burdine, 450 U.S. 248, 254 (1981); McDonnell Douglas Corp. v. Green, 411 U.S. 792, 802 (1973).

In order to rebut this presumption of discrimination, the burden shifts to defendant to produce a legitimate, race-neutral reason for the failure to promote. Burdine, 450 U.S. 248, 254; McDonnell Douglas, 411 U.S. at 802-04. The plaintiff must then prove that the defendants' proffered reason for the failure to promote was only a pretext, and that he was the victim of intentional discrimination. Saint Mary's Honor Ctr. v. Hicks, 509 U.S. 502, 506-08 (1993).

Plaintiff can prove that the defendant's reason was pretextual either directly or indirectly. To directly prove pretext, plaintiff must persuade "the court that a discriminatory reason more likely motivated the employer." Id. Plaintiff can indirectly prove pretext by "showing that the employer's proffered explanation is unworthy of credence. Binder v. Long Island Lighting Co., 933 F. 2d 187, 192 (2d Cir. 1991)(quoting Burdine, 450 U.S. at 256).

C. Failure to Promote Jon-Nwakalo

For the purposes of this summary judgment motion defendants do not contest that plaintiff has met the de minimus burden of establishing a prima facie case. In support of their motion defendants set forth evidence of legitimate, race-neutral reasons for their

selection f applicants other than Jon-Nwakalo for the positions he sought. Thus, the issue to be determined is whether plaintiff presented specific facts showing that there is a genuine dispute for trial regarding pretext, either by showing a discriminatory motivation by defendants, or that defendants' proffered legitimate explanations are not credible. See Saint Mary's Honor Ctr. v. Hicks, 509 U.S. at 506-08; Binder, 933 F. 2d at 192. This, quite simply, he did not do.

Defendants submitted evidence showing legitimate, non-discriminatory reasons why it denied Jon-Nwakalo each of the promotions he sought. (See generally Defs.' L.R. 7.1 Statement.) On each of the occasions where DASNY denied Jon-Nwakalo a promotion, the hiring supervisor selected a person thought to be better qualified for and better suited for the position. (See Van Vleck Aff.; Bainchi Aff.; Gray Aff.)

In opposition, plaintiff submits evidence that he believed his education and experience made him more qualified for the jobs he sought than any other persons.[1] (See Jon-Nwakalo Aff.) Plaintiff controverts defendants' 7.1 Statement of material facts not in dispute, which sets forth its legitimate reasons for the hiring decisions, merely by reciting his own (asserted by

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1 While initially complaining of discriminatory failure to promote regarding the applications for positions for which he was not hired while at FDC from 1990 to 1994, Jon-Nwakalo has withdrawn any claims pertaining to that time period. (Pl.'s 7.1 Statement ¶ 11.)

him to be superior) qualifications.[2] In no

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2 As required by the Local Rules, plaintiff makes a paragraph by paragraph reference to defendants' 7.1 Statement. However, each paragraph of plaintiff's 7.1 Statement states only that a particular paragraph of defendants' 7.1 Statement is disputed, referring the court to particular paragraphs of the Jon-Nwakalo affidavit. While seemingly meeting the requirements of Local Rule 7.1, this manner of setting forth material facts allegedly in dispute is cumbersome and fails to comply with the intent of Local Rule 7.1(a)(3). In this instance the court meticulously examined the parties' 7.1 Statements, cross-referencing the Jon-Nwakalo affidavit as necessitated by the unconventional format of plaintiff's 7.1 Statement. The parties are hereby put on notice, however, that any future 7.1 Statements in this clumsy, ponderous format will not be considered, and in accordance with Local Rule 7.1(a)(3) the adversary's material facts will be taken as uncontroverted.

instance did plaintiff point to evidence from which an inference of race discrimination could be drawn. Plaintiff set forth no evidence of a discriminatory motive on the part of the individuals responsible for hiring decisions or DASNY as a whole.

Jon-Nwakalo argues that defendants' failure to follow the DASNY Affirmative Action Program ("the Program") demonstrates intent to discriminate. The Program provides that protected-class applicants be afforded opportunities for appointment to vacant positions. (Jon-Nwakalo Aff. Ex. X at D 1689.) The Program requires posting of open positions, certain time intervals between advertising open positions and closing of the application process and taking the Program into consideratioon in hiring decisions. Id. Additionally, the Program provides that any experience, educational, licensing, or other prerequisites for a position be required to successfully carry out the duties and responsibilities of the position. Id.

Jon-Nwakalo contends that the licensing requirement for the Chief of Engineering Services and the Chief of Design Services positions for which he applied in October 1995 was not justified by legitimate reasons as required by the Program. Rather, Jon-Nwakalo argues, defendants failure to articulate a legitimate reason for the licensure prerequisite indicates discriminatory intent. Defendants, however, assert that the license was a valid requirement for these jobs because the persons filling the positions "conduct design reviews, create designs and stamp drawings with a registered architect's or engineer's stamp, and inspect construction projects. An architect or engineer cannot engage in these activities without a license." Bianchi Aff. ¶ 3.) Jon-Nwakalo has not submitted any other

evidence that the defendants instituted the licensure requirement based upon discriminatory motives.

The requirement for a an architects or engineers license for these positions is facially nondiscriminatory. Plaintiff's suggestion that the requirement is unnecessary and therefore contrary to the Program is rebutted by the legitimate reason proffered by defendants. Plaintiff has submitted no other evidence from which a reasonable person could draw discriminatory animus from the licensure requirement. See Kresnak v. City of Muskegon Heights, 956 F. Supp. 1327, 1339 (W.D. Mich. 1997).

Jon-Nwakalo further refers to the position of Project Manager III that he sought in June 1996, arguing that the Program was not followed. His argument, while not completely straightforward, seems essentially to be that he was not given sue consideration for promotion to this position as was required by the policy. This lack of consideration, as his argument is understood, is demonstrated by the fact that he was not promoted, despite his superior qualifications. Similarly, Jon-Nwakalo cites the hiring process in June 1998 for Managing Director of Construction Services as not following the Program. Additionally, Jon-Nwakalo alleges that he was not given due consideration for the position, as required by the Program, evidenced by the fact that he did not receive an interview. Even if defendants failed to follow the Program as alleged, plaintiff has not set forth facts indicating how that failure translates into discriminatory animus in light of the legitimate, non-discriminatory rationale set forth by defendants.

Having failed to show pretext directly by

establishing a discriminatory motive on the part of defendants, Jon-Nwakalo may still survive summary judgment by setting forth facts that whether defendants' proffered explanation is worthy of credence is a genuine issue for trial.

However, plaintiff failed to set forth any evidence that DASNY's proffered legitimate reasons for its hiring decisions were not credible. Regarding his initial assignment as Field Representative III, rather than as a Project Manager, DASNY set forth the process it underwent to make reassignments to FDC personnel, and asserted the fact that only five of thirteen FDC employees in positions equivalent to the one held by Jon-Nwakalo obtained positions at DASNY superior to Jon-Nwakalo's. (Def.' 7.1 Statement ¶¶ 55-75.) Plaintiff controverts this fact, asserting six people (not five) obtained higher positions, and that his own qualifications were superior to those assigned the Project Manager positions. Jon-Nwakalo Aff. ¶ 63-80.[3]) This comparison of qualifications does not indicate that defendants' decision-making rationale was not credible.

Similarly, defendants set forth what they contend are undisputed facts regarding the September and October Project Manager positions. (See Defs.' 7.1 Statement ¶ 76-84.) Specifically defendants state that the Project Manager position in Buffalo was given to one Carol Maynard based upon her three previous years of service in the Buffalo office, her performance and level

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3 Reference is made to the Jon-Nwakalo Affidavit rather than plaintiff 7.1 Statement for simplicity. See supra note 2.

of responsibility, and the needs of that office. (Defs.' 7.1 Statement ¶ 82).

Jon-Nwakalo controverts this assertion of a legitimate reason for the promotion decision by reference to his affidavit at paragraphs 95-103. Nothing in these paragraphs in any way undermines the legitimacy of the hiring decision. (See Jon-Nwakalo Aff. ¶¶ 95-103.) For example, paragraph 96 states that Jon-Nwakalo was invited to apply for an environmental planning position at DASNY, had an interview, but no offer was made. Paragraph 100 states that Jon-Nwakalo never informed the supervisor that he was not interested in moving to Buffalo. The only paragraph of those referenced that refers to Carol Maynard, other than paragraph 103, repeats what is set forth in the defendants 7.1 Statement except to add that Carol Maynard is of European descent. (See Jon-Nwakalo Aff. ¶ 103.) Again, Jon-Nwakalo's belief in his own superiority does not make defendants' belief in the superiority of another incredible. See Scaria v. Rubin, 117 F. 3d 652, 654-55 (2d Cir. 1997)(employer can make value judgment as to qualifications.)

Regarding the Chief of Design Service and Chief of Field Operations positions in October 1995, defendants contend that it is an undisputed fact that Jon-Nwakalo was not considered for these positions because he did not have an architects or engineers license, a requirement of the jobs. (See Defs. 7.1 Statement ¶¶ 88-89.) To controvert this fact Jon-Nwakalo again sets forth his "superior" qualifications, stating that he met all the qualifications except licensure. (Jon-Nwakalo Aff. ¶ 104-110.) Jon-Nwakalo's failure to meet the licensure requirements of the positions supports the credibility of defendants' decision

making, not the contrary.

Jon-Nwakalo argues that the defendants imposed unnecessary licensing requirements, contrary to the Affirmative Action Program, to provide an "artificial barrier" to his promotion. As previously noted, defendants have articulated a legitimate, facially nondiscriminatory reason for the licensing requirements. Additionally, defendants set forth evidence that three internal and several external non-minority candidates were excluded from consideration because of the licensing requirements. (Bianchi Aff. ¶ 4.) Plaintiff's recitation of his high qualifications and insistence that he was a better candidate for the job do not overcome the legitimacy of defendants' hiring decision as supported by undisputed facts. See Kresnak v. City of Muskegon Heights, 956 F. Supp. at 1338-39 (finding issue not submissible to jury where defendants proffer legitimate reason for job requirement and plaintiff fails to adduce evidence that imposition of the requirement was discriminatory.)

These facts professed by Jon-Nwakalo to be material and disputed as to the remaining positions at issue in fact are either not material or not disputed. In a manner comparable to that set forth above, Jon-Nwakalo avers superior qualifications without in any way providing evidence that the defendants' legitimate reasons for choosing another applicant over Jon-Nwakalo were not credible and thus pretextual.

D. Claim against Buono

Defendant John L. Buono ("Buono") argues that he took no action regarding the decisions not to promote Jon-Nwakalo and therefore the complaint against him

should be dismissed. Based upon the foregoing finding that plaintiff cannot sustain his burden in opposing defendants' summary judgment motion, any claims against Buono must also be dismissed.

E. State Law Claims

New York Human Rights Law claims are analyzed following the same standard as is used to analyze federal claims. Van Zant v. KLM Royal Dutch Airlines, 80 F. 3d 708, 714-15 (2d Cir. 1996). Accordingly, the state law claims must also be dismissed.

IV. CONCLUSION

Defendants have set forth evidence of legitimate, non-discriminatory reasons for each and every promotion decision at issue. Jon-Nwakalo has set forth no evidence that defendants' proffered legitimate reasons were pretextual. Jon-Nwakalo failed to establish pretext, by neither establishing a discriminatory reason that more likely motivated defendants' promotion decisions, nor showing that defendants' legitimate explanations for the decisions were unworthy of credence. See Saint Mary's Honor Ctr., 509 U.S. at 506-08; Binder, 933 F. 2d at 192. All defendants are therefore entitled to judgment as a matter of law as to all claims.

Accordingly, it is

ORDERED that defendants' motion for summary judgment is GRANTED and the complaint is DISMISSED in its entirety.

The Clerk of the Court shall enter judgment accordingly.

IT IS SO ORDERED.

/s/

David N. Hurd
United States District Judge

Dated: February 3, 2000
Utica, New York